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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by Verizon New Jersey Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in New Jersey	)	**WC Docket No. 02-67**

EMERGENCY PETITION FOR STAY OF ORDER

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SUMMARY

Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications ("MetTel") respectfully requests that the Federal Communications Commission ("the Commission") stay its *Order* authorizing Verizon to provide in-region interLATA long distance in New Jersey. The Commission's *Order* reads like a one hundred pages-long-plus apology by the Commission for Verizon's failure to meet performance targets and other requirements. At the same time it excuses Verizon's failures, the Commission discounts comprehensive evidence and studies put forth by MetTel and others.

In the *Order*, the Commission casually ignores its own prior precedent while setting the hurdle for 271 authorization far too low. Instead of placing the burden of proof on Verizon as required by law, the *Order* impermissibly places this burden on Verizon's challengers. Instead of conducting an independent determination of the merits of Verizon's application, the Commission's *Order* all but "rubber stamps" the New Jersey Board's conclusions. Moreover, the *Order* violates well-established precedent by assigning controlling weight to Verizon's third-party studies, while rejecting MetTel's evidence of actual commercial usage showing that Verizon failed to provide nondiscriminatory access to its operations support systems. Finally, in the *Order*, the Commission repeatedly relies on promises of future action by Verizon in place of actual evidence of compliance with Section 271's requirements, even though the law requires that the Commission assign no probative value to such "paper promises" in assessing a 271 application.

These are tough times for competitive carriers. Yet, instead of holding Verizon to its proof, the Commission has lowered the standard for Section 271 relief. Verizon failure to meet Section 271's requirements has resulted in MetTel being denied a meaningful opportunity

to compete in New Jersey, and MetTel will be irreparably harmed if the *Order* is allowed to remain in effect. Accordingly, the public interest requires that the Commission immediately stay its *Order*.

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Application by Verizon New Jersey Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in New Jersey	)))))	**WC Docket No. 02-67**

EMERGENCY PETITION
FOR STAY OF ORDER

Pursuant to Rules 1.41 and 1.44(e) of the Federal Communications Commission's ("the Commission's") Rules, 47 C.F.R. §§ 1.41, 1.44(e), Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications ("Petitioner" or "MetTel") hereby respectfully requests that the Commission stay its Memorandum Opinion and Order granting Verizon New Jersey Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc.'s (hereinafter collectively "Verizon's"), authorization to provide in-region, interLATA services in the state of New Jersey.[1] Specifically,

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1 *In the Matter of Application by Verizon New Jersey Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in New Jersey*, WC Docket No. 02-67, FCC 02-189, Memorandum Opinion and Order (rel. June 24, 2002) ("*Order*").

Petitioners request the Commission to withdraw Verizon's authorization to provide in-region interLATA service on grounds that Verizon has failed to satisfy Section 271 of the 1996 Telecommunications Act's ("the Act's") requirements for in-region long distance entry.[2] Petitioners submit that the Commission, in granting Verizon's application for authorization in New Jersey, failed to apply properly the burden of proof, impermissibly relied on promises of future action by Verizon, and rejected hard evidence of actual commercial usage put forth by MetTel,, instead relying on hypothetical studies issued by Verizon. As set forth below, Petitioners satisfy the applicable legal standards used by the Commission in determining whether grant of a stay of the *Order* pending reconsideration or judicial review is appropriate.

This Petition is submitted on an emergency basis, requesting the Commission's immediate attention. If the Commission does not act to stay its *Order* by July 22, 2002, Petitioners will consider such inaction to constitute a rejection of their Petition. If this Petition is rejected by the Commission, the Petitioners intend to seek appropriate relief before the United States Court of Appeals for the District of Columbia Circuit.

INTRODUCTION

The Commission's *Order* reads like a one hundred pages-long-plus apology by the Commission for Verizon's failure to meet performance targets and other requirements -- a veritable laundry list of flimsy excuses for why Verizon failed to meet Section 271's competitive checklist requirements and the public interest standard. At the same time it excuses Verizon's

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2 47 U.S.C. § 271 *et seq.* Section 271 of the Act prohibits Bell Operating Companies ("BOCs") such as Verizon from providing interstate, interexchange telecommunications services between "local access transport areas" ("LATAs") within their operating regions prior to satisfying the requirements of section 271 of the Act. *Id.*

failures, the Commission discounts comprehensive evidence and studies put forth by MetTel and other challengers of the authorization. To wit:

- Instead of placing the burden of proof on Verizon as required by well-established Commission precedent, the *Order* impermissibly shifts the burden to the application's challengers.
- Instead of conducting an independent determination of the merits of Verizon's application, as is required by law, the Commission's *Order* all but "rubber stamps" the New Jersey Board's conclusions.
- The Commission often – and incorrectly -- applies a "clear error" standard to assessing Verizon's behavior, yet even under this overly stringent standard, "clear errors" were committed by the Commission and the New Jersey Board. At other times, the Commission allows Verizon to satisfy its burden of proof merely by submitting a "plausible" explanation. This has never been – and should never be – the standard for satisfying Section 271.
- The *Order* violates well-established precedent by assigning controlling weight to Verizon's third-party studies, while rejecting MetTel's evidence of actual commercial usage tending to show Verizon failed to provide nondiscriminatory access to operations support systems.
- Finally, in the *Order*, the Commission repeatedly relies on promises of future action by Verizon in place of actual evidence of compliance with Section 271's requirements, even though the law requires that the Commission assign no probative value to such "paper promises" in assessing a 271 application.

At no time did the Commission acknowledge that it was changing its prior policy when it made its findings. Rather, Commission appears to have casually disregarded its prior policies concerning Section 271 approval, in violation of long-standing administrative law precedents.[3] Moreover, in *Sprint Communications Co. L.P. v. FCC*, the D.C. Circuit remanded an issue to the Commission for giving a challenger's argument in a 271 proceeding "rather a brush-off."[4] In the instant case, the Commission systematically and repeatedly gave *all* of the challengers' arguments the "brush-off", in keeping with its goal of making grant of 271 applications a virtual *fait accompli.*

In taking the actions outlined above, the Commission has set the bar so low as to make the process for Section 271 authorization all but meaningless in instances where the state commission has recommended grant of an application. As a result of the Commission's actions, MetTel has been denied a meaningful opportunity to compete with Verizon, in violation of law. There will be no way to "unscramble the egg" and return matters to the *status quo ante* once Verizon's efforts to compete for and win in-region long distance customers are in full swing. Although this process already has begun due to the July 3, 2002 effective date of the *Order*, the harm will be minimized if MetTel's emergency stay petition is granted.[5] If the Commission fails

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3 *AT&T Corp. v. FCC*, 236 F.3d 729, 736-37 (2001) ("The FCC cannot silently depart from previous policies or ignore precedent") (*citing Committee for Community Access v. FCC*, 737 F.2d 74, 77 (D.C. Cir. 1984)); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)("an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored").

4 274 F.3d 549, 554 (D.C. Cir. 2001).

5 As noted below, Verizon "jumped the gun" on section 271 approval by soliciting to obtain the interLATA long distance business of 558,000 customers in New Jersey prior to Commission approval of its application, in apparent violation of Section 271 of the Act. *See Order* at para. 188. Just as it apparently excused this premature solicitation of

. . . *continued*

to act immediately to stay its *Order*, MetTel will continue to suffer irreparable harm as the result of a loss of goodwill and customers.

This Commission should immediately stay its *Order* and revoke Verizon's authorization to prevent further irreparable harm from occurring to the businesses of MetTel and Verizon's other competitors.

BACKGROUND

Section 271 of the Act prohibits BOCs such as Verizon from providing interstate, interLATA long distance service in any state within their operating regions unless they apply to and receive approval from the Commission through the Section 271 process. Pursuant to Section 271, the Commission must issue a written determination on each 271 application no later than 90 days after receiving it.[6] Section 271(d)(2)(A) requires the Commission to receive an evaluation from the Attorney General of the United States before making any determination approving or denying a Section 271 application. The Commission is required to "give substantial weight to the Attorney General's evaluation."[7] In addition, the Commission must consult with the relevant state commission, in this case the New Jersey Board of Public Utilities ("New Jersey Board"), to verify that the BOC has satisfied Section 271's "competitive checklist."[8] No special weight or deference is accorded the state commission's consultation.

Verizon initially applied to the Commission for Section 271 approval for the state of New Jersey on December 20, 2001, but withdrew its application on March 19, 2002,

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customers, it will be relatively easy for the Commission to restore the *status quo ante* by grant of a stay, as the process of soliciting customers by Verizon has only recently begun.

6 47 U.S.C. § 271(d)(3).

7 *Id.* § 271(d)(2)(A).

8 *Id.* § 271(d)(2)(B).

apparently believing it could not satisfy Section 271's requirements. Verizon then refiled its application a mere week later, on March 26, 2002. MetTel, AT&T Corp. ("AT&T"), XO Communications ("XO"), the state of New Jersey's Division of the Ratepayer Advocate ("NJDRA"), and many other parties vigorously opposed Verizon's application on grounds that Verizon failed to satisfy Section 271's requirements.

MetTel and several other challengers provided evidence, including detailed statistical analyses reflecting actual commercial usage of Verizon's facilities, demonstrating that Verizon had not complied with the checklist's requirement to provide nondiscriminatory access to "operations support systems" ("OSS").[9] Although the New Jersey Board recommended approval of the Verizon's application, the New Jersey Division of the Ratepayer Advocate filed comments opposing grant of the application.[10] In addition, the Department of Justice also raised concerns about Verizon's showing, noting that "issues have been raised regarding nondiscriminatory access to Verizon's OSS in New Jersey."[11] The Department of Justice urged the Commission not to grant Verizon's application unless the Commission could "satisfy itself" that the concerns over OSS identified by Verizon's competitors had been addressed.[12]

On May 31, 2002, prior to 271 approval (but several months after Verizon's application had been filed), Verizon disclosed that it had solicited 558,000 New Jersey customers

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9 Incumbent LECs such as Verizon use a variety of systems, databases, and personnel (collectively referred to as OSS) to provide service to their customers. *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 3989-90 at ¶ 83.(1999) ("*New York 271 Order*"). The Commission consistently has found that nondiscriminatory access to OSS is a prerequisite to the development of meaningful local competition. *See id.*

10 *Order* at para. 11.

11 Department of Justice NJ II Evaluation at 9 (footnotes omitted).

in an effort to obtain their interLATA long distance business.[13] However, the Commission refused to hold this apparent and blatant violation of Section 271 against Verizon.[14] On June 24, 2002, the Commission granted Verizon's application over the strong objections of MetTel, the NJDRA, and several other commenters that Verizon failed to provide nondiscriminatory access to its OSS.

ARGUMENT

In reviewing a motion for stay, the Commission has followed the precedent of the United States Court of Appeals for the District of Columbia Circuit. *See In re Virgin Islands Tel. Corp.*, 7 FCC Rcd 4235 at ¶ 13 (1992). Thus, the Commission may grant a stay when (1) the movant is likely to prevail on the merits; (2) the movant will likely suffer irreparable harm absent a stay; (3) others will not be harmed if a stay is issued; and (4) the public interest will not be harmed if a stay is issued. *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977); *TCI TKR of Georgia, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 445 (2000). As demonstrated below, MetTel's case satisfies each prong of this standard.[15]

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12 Department of Justice NJ II Evaluation at 9 (footnotes omitted).

13 *Order* at para. 188.

14 *Id.*

15 The D.C. Circuit has emphasized that these factors relate on a "sliding scale," such that when "the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas" are less compelling. *See Serono Labs v. Shalala*, 158 F.3d 1313, 1317 (D.C. Cir. 1998). This is particularly true where, as here, a stay request simply seeks to preserve the *status quo* pending judicial review. Indeed, the Commission itself has indicated that a stay maintaining the *status quo* should be granted "when a serious legal question is presented, if little harm will befall others if the stay is granted and denial of the stay would inflict serious harm." *Florida Publ. Serv. Comm'n*, 11 FCC Rcd 14324, 14325-26 & n.11 (1996); *see also Washington Metropolitan*, 559 F.2d at 844 ("An order maintaining the *status quo* is appropriate when a serious legal question is

. . . *continued*

I. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS

In granting Verizon's application, in no area did the Commission find that Verizon conclusively and undisputedly met the standards for interLATA entry. Rather, in the many situations where the evidence was in equipoise or otherwise a close call, the Commission gave Verizon the benefit of the doubt, and impermissibly gave competitors' arguments the "brush- off." Instead of holding Verizon to its proof, the Commission allows it merely to submit a "plausible explanation," and it upholds the New Jersey Board's findings absent "clear error." In so doing, the Commission arbitrarily and capriciously sets the standard for 271 approval far too low. Moreover, the Commission also repeatedly and explicitly substitutes Verizon's pledge to "discuss the issues" for reasoned resolution of competitors' claims. For instance, the Commission based its finding that Verizon's OSS is nondiscriminatory on "Verizon's efforts to work closely with MetTel to fix any problems,"[16] even though elsewhere in the *Order* the Commission noted that the working relationship between MetTel and Verizon has been "contentious and adversarial."[17] The Commission explicitly recognized that MetTel had difficulty gaining Verizon's cooperation prior to grant of 271 authority.[18] One can easily predict what this relationship will be like now that the Commission has so gratuitously granted Verizon the "carrot" of 271 authority while refusing to employ the "stick" of holding Verizon to its proof.

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presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. . . . [Such relief is available] whether or not movant has shown a mathematical probability of success.").

16 *Order* at para. 116.

17 *Id.* at para. 195.

18 *Id.*

A. Instead of placing the burden of proof on Verizon as required by well-established Commission precedent, the *Order* impermissibly shifts the burden to the application's challengers.

It is beyond dispute that, in evaluating a Section 271 application, the BOC bears the burden of proof. As the Commission has stated:

> We reemphasize that the BOC applicant retains at all times the ultimate burden of proof that its application satisfies all of the requirements of Section 271, *even if no party files comments challenging its compliance with a particular requirement.*[19]

Instead of following this precept in its evaluation of Verizon's New Jersey application, the Commission takes this policy and reverses it, placing the burden of proof on the challengers of the grant instead of on Verizon. Time and time again in the *Order*, where it is a case of the competitors' evidence against Verizon's assurances, the Commission will credit Verizon's flimsy excuse and reject the contentions of competitors. So long as Verizon puts forth a plausible explanation, the Commission will credit it. Time and again in the *Order*, the Commission rejects MetTel's detailed evidence of actual commercial usage in favor of "plausible explanations" raised by Verizon.[20] Taking matters one step further, in many instances, the Commission rejects the evidence put forth by the challengers *without even requiring Verizon to respond to the allegations*. Such practice is not, and should not, be the law.

The following represents only a partial list of instances in the *Order* where the Commission impermissibly gave competitors' arguments the brush-off, and failed to hold Verizon to its burden of proof. For instance, MetTel and several other challengers put forth evidence of commercial usage demonstrating that Verizon's systems produce recurring or

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19 *New York 271 Order*, 15 FCC Rcd at 3972 (1999).

20 *See e.g., Order* at paras. 106, 108.

systematic inaccuracies in its wholesale bills provided to competing carriers.[21] As set forth in greater detail below, the Commission has often held that "the most probative evidence that a BOC is providing nondiscriminatory access is evidence of actual commercial usage,"[22] and not analyses put forth by third-party consultants. In fact, the Commission has stated that it looks to third party testing *only* where no *actual* commercial usage exists.[23] Yet, when provided with actual evidence of commercial usage, the Commission rejected it in favor of Verizon's audit provided by third-party vendors, Price Waterhouse Coopers and KPMG Consulting ("KPMG"), outside consulting firms hired by Verizon to bolster its case.[24]

In assessing Verizon's wholesale billing performance – which the Commission identified as "a close call" in granting Verizon's Pennsylvania application,[25] and states that it will provide additional attention to the issue here – the Commission squarely shifted the burden of proof from Verizon to its competitors. First, the Commission states that the commenters' evidence of commercial usage is "not persuasive because they lack additional explanation as to the types of errors that" are contained on the bills, and "fail to clarify the actual percentage of their current wholesale bills that they have properly put into dispute with Verizon."[26] However, nowhere is it, nor should it have been, the competitors' burden to provide this type of

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21 *Id.* at para. 126.

22 *New York 271 Order*, 15 FCC Rcd at 3974.

23 *BellSouth Louisiana Application Order*, 13 FCCR 20599 (1998) at para. 56 ("In situations where no actual commercial usage exists, we consider any carrier-to-carrier testing, independent third-party testing, and internal testing.").

24 *Order* at para. 125.

25 *Id.* at para. 76.

26 *Id.* at para. 126.

information.[27] Even though the Commission acknowledges that a factual dispute exists concerning this issue, it refuses to resolve it, suggesting that the challengers take the issue up with the New Jersey Board.[28] The Commission then finds that MetTel and AT&T had provided "insufficient evidence" to show that Verizon's billing practice violates the competitive checklist. The Commission resolves the dispute in favor of granting Verizon's application, ignoring the fact that the burden of proof is to remain *on Verizon* at all times.

Another example showing this pattern is the short shrift that the Commission gives to MetTel's evidence that Verizon submitted false notifiers concerning trouble tickets. Although discussions of OSS can be highly complex, MetTel's position, reduced to its essence is simple, as the following example shows: "notifiers" are used to show when certain tasks have been accomplished in order to gauge Verizon's compliance with performance metrics. If a metric requires a certain task to be accomplished within three days, the notifier will provide evidence of exactly how long it took for Verizon to complete the particular task. However, MetTel noticed that Verizon's performance on the metrics did not comport with its actual experience of how quickly Verizon accomplished certain tasks. MetTel began to suspect that Verizon was cooking its books by sending out "false notifiers," *i.e.*, sending out notifiers showing tasks had been completed in order to improve its performance on the metrics, even though the tasks had not in fact been completed. To prove its point, MetTel began to conduct its own audits of Verizon's performance using a variety of measuring techniques. For instance, to

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27 *New York 271 Order* at 3972; *see also Sprint v. FCC*, 274 F.3d at 558 (noting challenging carriers could legitimately protest any burden of producing studies assigned to them in a 271 proceeding).

28 *Order* at para. 128.

determine whether a customer had been switched over to a new carrier, MetTel would determine when traffic began to flow over a particular circuit.

Although not strictly required to do so under the law, MetTel took up the challenge of providing the Commission with information on Verizon's failure to meet performance targets, taking the Commission at its word that the evidence would be given the weight it deserved under its prior precedents. Of MetTel's information concerning notifiers, the Commission stated:

> MetTel has extensively documented and inventoried its submissions of orders and receipt of notifiers. We commend MetTel on its efforts to compile and submit independent evidence and construct an affirmative case for its position.[29]

The Commission also found that "the notifier accuracy issues raised by MetTel appear to be more than just a few isolated incidents."[30] Nonetheless, the Commission rejected this evidence in favor of hypothetical third-party studies provided by Verizon's accounting consultants.

The burden should have been on Verizon, and not MetTel to "construct an affirmative case for its position,"[31] yet the Commission's discussion of the notifiers issue shows it impermissibly transferred the burden of proof from Verizon to MetTel. Similarly, when MetTel provided evidence tending to show that Verizon failed to clear trouble tickets within a commercially reasonable timeframe, the Commission allowed Verizon to rebut the evidence using a "special study" described only in a declaration by some Verizon employees.[32] Once

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29 *Order* at para. 94.

30 *Id.* at para. 109.

31 *See id.* at para. 109.

32 *Id.* at para. 120.

again, the Commission gives the benefit of the doubt to Verizon, by impermissibly transferring the burden of proof to MetTel.

In other cases, the Commission rejected MetTel's notifier evidence by claiming that MetTel was the only carrier to notice and complain about the discrepancies. However, this assertion is contradicted by the *Order*'s own discussion of this issue.[33] Although MetTel may have been the only carrier to take the time and expense to compile a study on notifiers to show Verizon failed to meet its performance metrics with respect to OSS, many other carriers raised questions about Verizon's performance concerning OSS, as did the Department of Justice. The deficiencies that MetTel documented in its study provide concrete proof of allegations made by these other carriers and of the Department of Justice's concerns. Going to great lengths, MetTel extensively documented evidence tending to show that Verizon failed, and is failing, to provide competitors with a meaningful opportunity to compete by sending out false notifiers. The Commission's glib observation that no other commenter made the identical claim made by MetTel, in the identical way that MetTel made it, cannot substitute for reasoned analysis of MetTel's evidence. Nor can it justify shifting the burden of proof from Verizon to MetTel. The Commission improperly shifted the burden of proof when it allowed Verizon's third-party accounting consultant reports and self-serving affidavits to trump MetTel's evidence of actual commercial usage.

The *Order*'s treatment of the dispute over access to high capacity loops is yet another example of how the Commission improperly shifted the burden from Verizon to its

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33 More than one competitor raised issues concerning notifier "timeliness and accuracy," as did the Department of Justice. *Id.* at para. 94 (noting that "[c]ompetitor*s* [plural] raise several issues regarding notifier timeliness and accuracy," and that the Department of Justice commented that the Commission" should further investigate this issue).

competitors. Even though the Commission notes that Verizon failed to achieve parity with provision of high capacity loops for three of the five months studied, it gives Verizon the benefit of the doubt on this point, characterizing XO's arguments to the contrary as "conclusory and not supported by specific evidence."[34] Yet, XO's arguments *are* supported by evidence that Verizon failed to achieve parity in providing loops 60 percent of the time. The Commission, however, rejects this evidence, in essence saying that, because there was so little competition in New Jersey and so few competitors seeking to obtain high capacity loops, the lack of parity was probably a statistical artifact.[35] Ironically, the Commission uses the fact of lack of competition to bolster Verizon's case that the New Jersey market is competitive. Once again, the Commission sides with Verizon, and for the competitors, it is "heads Verizon wins, tails you lose."[36]

Similarly, the Commission's treatment of anecdotal evidence is yet another case in point of how the *Order* shifts the burden from Verizon to its challengers. The Commission has never

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34 *Order* at para. 151.

35 *Id.* at paras. 149-151.

36 The Commission also relies on promises of *future* action by Verizon in place of actual evidence of compliance with section 271's requirements, even though the law requires that the Commission assign no probative value to such "paper promises" in assessing a 271 application. As the Commission has often held, "a BOC's promises of future performance to address particular concerns raised by commenters have *no probative value* in demonstrating its present compliance with the requirements of section 271. Paper promises do not, and cannot, satisfy a BOC's burden of proof." *Ameritech Michigan Order*, 12 FCC Rcd 20543, 20573-74 (1997) (emphasis supplied); s*ee also New York 271 Order*, 15 FCC Rcd at 3969, para. 37. In violation of this clear statement, the *Order* repeatedly and explicitly relies on paper promises of future action. In fact, some of the "paper promises" that the Commission relies on relate to OSS issues, which the Commission in its *Rhode Island Order* stated represented the textbook example of the type of services whose effectiveness would be difficult to measure in advance, making future promises of compliance particularly suspect. *Rhode Island 271 Order*, 17 FCCR 3300 (2002) at 10.

said that anecdotal evidence is inadmissible. Rather, anecdotal evidence, although possibly insufficient to overcome a BOC's *prima facie* case of checklist compliance, "may be indicative of systemic failures" in a BOC's operations.[37] Yet, when Allegiance and XO gave specific examples of anticompetitive behavior by Verizon to prove that Verizon failed Section 271's public interest requirement, the Commission characterized the evidence as anecdotal, and did not even require Verizon to respond.[38] In fact, in rejecting these challengers' arguments without requiring a response by Verizon, the *Order* does not even give enough explanation to allow a reader to discern the actual arguments made by Allegiance and XO.[39] By rejecting these arguments without even requiring Verizon to response, the Commission incorrectly placed the burden on the competitors to *disprove* Verizon's long distance entry was inconsistent with the public interest. This kind of improper burden shifting violates Section 271.[40]

These disputes reflect a familiar pattern in the *Order*. In faulting the challengers for failing to provide the additional information mentioned above, the format of which the challengers no doubt could only guess at ahead of time, the Commission created a moving target for the challengers to shoot at in opposing Verizon's application. The Commission faults the challengers at times for including only "bare assertions" in their pleadings, and awards the point to Verizon, even where Verizon does not deign to offer a response to the point.[41] Where the challengers respond with detailed studies evidencing actual commercial usage, the Commission

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37 *New York 271 Order* at 3973.

38 *Order* at paras. 184-185.

39 *Id.* at paras. 184-185.

40 *New York 271 Order*, 15 FCC Rcd at 3973.

41 *See, e.g. Order* at paras. 184-185.

finds fault with the studies.[42] Had the commenters provided more detailed information the Commission alluded to, the likely result is that the Commission would have found some other fault with it in order to carry out its pre-ordained verdict of allowing Verizon to enter the New Jersey long distance market. Such an approach is inconsistent with the Act, and requires immediate stay of the *Order*.

B. Instead of conducting an independent determination of the merits of Verizon's application, as is required by law, the Commission's *Order* all but "rubber stamps" the New Jersey Board's conclusions.

Although Section 271 requires the Commission to give "substantial weight" to the views of the Department of Justice, it merely requires the Commission to "consult" with the relevant state commissions. Similarly, as the "expert agency charged with implementing" the statute, the Commission in the past has interpreted Section 271 to require it to make an independent determination of all facts relevant to 271 approval.[43] Yet, instead of conducting an independent determination of the merits of Verizon's application, as is required by law, the Commission's *Order* all but "rubber stamps" the New Jersey Board's conclusions. By deferring to the New Jersey board in the absence of "clear error," the Commission does more than merely "consult" with the state commission. Rather, it unlawfully delegates decision-making authority to the state commission in violation of the Commission's own duty to conduct an independent inquiry.[44]

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42 *See id.* at paras. 107-109.

43 *See SBC Communications Inc. v. FCC*, 138 F.3d 410, 415 (D.C. Cir. 1998).

44 Although the New Jersey Board recommended approval of Verizon's application, it should be noted that another state entity representing New Jersey, the NJDRA, staunchly opposed grant of the application.

MetTel and the other parties expended a great deal of time and effort opposing Verizon's application before the Commission, which, by statute, is required to issue an independent determination as to the merits. In paragraphs 93 through 120 of the *Order*, the Commission addresses five separate issues involving OSS. For each issue, MetTel submitted detailed evidence that it compiled by independently investigating whether Verizon actually met its performance metrics or whether Verizon instead issued false or misleading statistics. The Commission refused to confront MetTel's evidence of actual commercial usage head on, instead preferring to defer to the New Jersey Board's findings, to claim (erroneously) that MetTel was the only carrier to challenge the accuracy of the notifiers, or to credit Verizon's third-party studies.[45] The Commission even dodges the merits of MetTel's evidence by using the rationale that MetTel can continue to "work" with Verizon to resolve the issues *after* grant of the 271 application.[46] Instead of confronting MetTel's evidence, the Commission consigns MetTel to the "contentious and adversarial"[47] process of continuing to "work" with Verizon to solve it, *without* Commission involvement.[48] But MetTel assembled its evidence and filed comments with the Commission precisely because its "business to business" negotiations with Verizon failed to yield results. This "contentious and adversarial" process, while difficult before, will very likely become impossible now that MetTel's only leverage - the pendency of a 271 application – has been removed.

Resolving problems such as MetTel currently is experiencing with Verizon is the very task that Congress intended the 271 process to address. The Commission uses this artifice

45 *Order* at paras. 95-96.

46 *Id.* at para. 97.

47 *Id.* at para. 95.

to avoid addressing the merits of MetTel's evidence for several important OSS issues.[49] In other instances, the Commission explicitly states it will not find facts and will instead act as a reviewing court, and again rejects MetTel's evidence in favor of Verizon's "plausible" explanations.[50] However, Section 271 requires the Commission perform an independent investigation, not merely to act as a reviewing court. By deferring to the New Jersey Board's conclusions so completely, and refusing to conduct an independent evaluation of MetTel's evidence, the Commission has deprived MetTel of the forum for pleading its case that Congress intended it to have.

II. APPELLANTS WILL SUFFER IRREPARABLE HARM ABSENT A STAY

These are tough times for the telecommunications industry, especially for competitive local exchange carriers such as MetTel -- perhaps the toughest times since the Act became law. Gaining access to sources of financing is extremely difficult even for large companies, and is especially for upstart competitors such as MetTel that are seeking to fulfill the Act's promise of local competition. Accounting hijinks engaged in by large carriers such as Qwest and WorldCom have made the process of raising money even more difficult. During this period, well-financed incumbent LECs such as Verizon, which hold the lion's share of the local customers and control access to the facilities – such as OSS – that carriers like MetTel need to compete are able to solidify their already dominant position in the market. Congress intended to 271 process as a way to erode the vast competitive advantage that dominant incumbents like Verizon hold over small carriers like MetTel that are seeking to challenge this dominance.

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[48] *Id.* at para. 97.

[49] *See, e.g., id.* at paras. 95-97 (order processing notifiers), 104 (order completion notifiers).

[50] *Order* at para. 106.

Verizon has every incentive to make it as difficult as possible for MetTel to compete. The only leverage that small competitors such as MetTel possess in dealing with behemoths like Verizon *is* the 271 process. MetTel depends on the Commission to employ the 271 process to level the playing field as Congress intended. Instead of giving competitors' arguments the "brush-off" as it did in the *Order*, the Commission should be exercising *extra care* to ensure that BOCs such as Verizon fulfill their burden under the statute. Yet, at the very time that it is most important to hold Verizon to its proof, the Commission appears to have placed its thumb on the scales of justice to favor Verizon by shifting the burden of proof for 271 approval from Verizon to MetTel.

Absent a stay, MetTel will suffer a variety of harms that cannot be remedied. Even if the *Order* is overturned a year from now as the result of MetTel's appeal, unwinding Verizon's by-then entrenched operations in New Jersey will be extremely difficult and onerous for all involved. And, more importantly, the harm sustained by MetTel and the other competitors will be impossible to address through monetary damages. In contrast, returning to the *status quo ante* will be easy if the *Order* is stayed right now, before Verizon's marketing efforts have fully geared up. An immediate stay will result in less disruption for all of the carriers involved, as well as for their confusion for their customers.

In addition, for virtually all of the many damaging aspects of the *Order* there is no suitable remedy at law. Because "timing is everything" in the dynamic competitive telecommunications world, if MetTel's appeal is granted months from now but the *Order* is not stayed, the competitive landscape for that market will have changed dramatically – and in an adverse fashion – before MetTel is given a meaningful opportunity to compete. Thus, even if the *Order* is ultimately struck down, there is no guarantee that Petitioners can recoup what they will lose in the interim absent a stay.

The telecommunications market in New Jersey is not static. At issue here is the ability of competing carriers to obtain nondiscriminatory access to Verizon's OSS. Problems with Verizon's OSS affect MetTel's relationships with current customers and also its opportunity to attract new customers. And, of course, a lack of nondiscriminatory access to Verizon's OSS will hamper MetTel's ability to compete with Verizon. If customers and opportunities are lost because MetTel is denied a meaningful opportunity to compete with Verizon, the opportunity and the customers it represents may not come around again. As bad as this loss of business is, it is not the only harm. Rather, the unfair competitive conditions imposed by the *Order* have a "chain reaction" effect. For instance, if MetTel cannot expand its business because it is denied a meaningful opportunity to compete with Verizon, MetTel cannot grow its revenues. If MetTel is unable to grow its revenues, it will be less attractive to lenders, thus resulting in higher financing costs, at a time when obtaining financing is difficult even under the best of circumstances. These higher financing costs will, in turn, lead to a spiraling series of problems for carriers such as MetTel.

Without sources of financing at reasonable rates, MetTel cannot afford to operate efficiently, making it difficult for MetTel to make the investments in new equipment and technology necessary to attract the best customers or provide a high level of customer service. As a result, the expansion of MetTel's customer base could suffer, leading to damage to MetTel's reputation. These harms cannot fully be addressed simply by the payment of money, but rather, would have a profound and permanent effect on MetTel's business prospects. Because of these harms, allowing Verizon to enter the market prior to satisfying Section 271's requirements would result in unfair competition.

Courts have recognized that unrecoupable losses resulting from unfair competition are the epitome of irreparable harm. *See Independent Bankers Ass'n of Am. v. Smith*, 534 F.2d 921, 929 (D.C. Cir. 1976); *see also Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 941, 843, n.2 (D.C. Cir. 1977) (noting that the destruction of a business is an essential economic injury and not a "mere" economic injury that is insufficient to warrant a stay). Absent a stay, Petitioners and other CLECs will be profoundly damaged in ways that are simply impossible to quantify and cannot be remedied at law.

III. NO OTHER PARTY WILL BE HARMED IF STAY IS GRANTED, AND STAY OF THE *ORDER* WILL SERVE THE PUBLIC INTEREST

If the Commission's *Order* takes effect, thereby depriving MetTel of a meaningful opportunity to compete against Verizon, MetTel and other competitors will suffer irreparable harm. Additionally, consumers will be harmed as the Commission's *Order* could cause competitors such as MetTel to exit the market or provide lesser quality services. In contrast, Verizon will not be harmed if the Commission's improvident grant of 271 authority is revoked at this early date. If, as MetTel asserts, authority was improperly granted, Verizon does not deserve to be in the market, and no public interest benefits will occur if Verizon is allowed into the market prematurely. Rather, revocation of 271 authority will incent Verizon to improve its OSS, at which time it can reapply for 271 authority, thereby allowing competitors and their customers to benefit from those improvements.

IV. CONCLUSION

Petitioners have demonstrated that, due to the Commission's unexplained deviation from its prior precedent by shifting the burden of proof from Verizon to the not deserve to be in the market, and no public interest benefits will occur if Verizon is allowed into the market prematurely. Rather, revocation of 271 authority will incent Verizon to improve its OSS, at which time it can reapply for 271 authority, thereby allowing competitors and their customers to benefit from those improvements.

IV. CONCLUSION

Petitioners have demonstrated that, due to the Commission's unexplained deviation from its prior precedent by shifting the burden of proof from Verizon to the challengers, as well as other violations of the APA as detailed above, Petitioners are likely to succeed on the merits, and that, if the *Order* is allowed to remain in effect, Petitioners will suffer irreparable harm. In contrast, if a stay is granted, other parties will not be harmed, and the public interest will benefit. Therefore, Petitioners' request for stay must be granted.

Respectfully submitted,

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Dated: July 18, 2002

CERTIFICATE OF SERVICE

I, Alice R. Burruss, hereby certify that on this 18th day of July, 2002, I served copies of Emergency Petition for Stay of Order in WC Docket No. 02-67 by hand delivery on the following:

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